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**Tellepsen Pipeline Services Company and Pipeliners
Local Union No. 798.** Cases 16–CA–20035 and
16–RC–10120

September 24, 2001

**DECISION, ORDER AND DIRECTION
OF SECOND ELECTION**

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND
TRUESDALE

On March 2, 2000, Administrative Law Judge Howard I. Grossman issued the attached decision. Respondent filed exceptions and a supporting brief. Petitioner filed a Motion for Expedited Review and Summary Disposition and a supporting memorandum, deemed to be an answering brief. Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions as modified, to adopt the recommended Order as modified,² to issue a new notice, and to direct a second election.

1. The judge found that Respondent violated Section 8(a)(1) by "[t]elling employees that its client, Texas Utilities, *could* terminate its contract with Respondent if the Union won a forthcoming election, that the employees *might* lose their jobs, and that Respondent *would* close down the business" (emphasis added). The judge credited employee Scott Stacy's testimony that Robert Redman, his supervisor and close, personal friend for

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit. Thus, we find no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated a bias against the Respondent in his analysis or discussion of the evidence.

² In addition to the modifications to the judge's recommended Order discussed below, we modify paragraph 2(e) to revise the triggering date of Respondent's notice-mailing obligation to the date of the first unfair labor practice. *Excel Container, Inc.*, 325 NLRB 17 (1997).

We also modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB No. 15 (2001).

many years, told him that Respondent's client, Texas Utilities, could terminate its contract with Respondent if the Union won the election, and that all of Respondent's employees could lose their jobs if the Union won the election. The judge also credited the testimony of welders Jimmy Word and Keve Blacksher³ that Supervisor Tracy LaBuff stated that Company Owner and President Howard Tellepsen said he would shut the doors before he would go union and that employees would lose their jobs if the Union won the election. Finally, the judge credited employee Jimmie Vickery's testimony that Tellepsen said employees would lose their jobs if the Union won the election.

Respondent excepts, first, on credibility grounds, denying that its agents made the statements attributed to them. Alternatively, Respondent argues that, assuming the statements were made, they are protected by Section 8(c) as an expression of the possible consequences of unionization. For the following reasons, we reject these arguments.⁴

Section 8(c) provides that an employer expression of views, argument, or opinion is not an unfair labor practice unless the expression contains a "threat of reprisal or force or promise of benefit." However, the protection afforded to speech by Section 8(c) is not absolute, and any assessment of permissible employer expression "must be made in the context of its labor relations setting." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). Further, employer predictions must be "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control" *Id.* at 618. Thus, an employer's free speech rights do not include statements which interfere with the rights of employees to associate freely, as those rights are embodied in Section 7 and protected by 8(a)(1) and the 8(c) proviso. Under this analysis, the Board has held that direct threats to close a plant as a means of combating a union organizational drive constitute unlawful interference, unprotected by Section 8(c). *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 268 (1965) (court distinguished lawful termination of a business from proscribed threat to close); *Nebraska Bulk Transport, Inc.*, 240 NLRB 135, 157 (1979), *enfd.* in relevant part 608 F.2d 311 (8th Cir. 1979).

³ Blacksher's status as an employee is disputed by Respondent, who asserts that he is a supervisor.

⁴ Respondent also excepts to the judge's factual conclusion that "Tellepsen's admitted statements [set forth in the last paragraph of Sec. D, 1 of his decision] thus lead to a probable conclusion similar to that of General Counsel's witnesses—use of Union labor might result in a shutdown of the job." In finding the 8(a)(1) violations discussed below, we do not rely on this factual conclusion.

Here, the judge found, and we agree, that Respondent's statement that Company Owner and President Tellepsen "would shut the doors" before he would go union violates Section 8(a)(1). *Overnite Transportation Co.*, 296 NLRB 669, 670 (1989), *enfd.* 938 F.2d 815 (7th Cir. 1991). Similarly, Tellepsen's statement to employees at a safety meeting that employees *would* lose their jobs if the Union won the election⁵ is a coercive threat, unprotected by Section 8(c), and violative of Section 8(a)(1). Indeed, the threat was particularly coercive because President Tellepsen, himself, disseminated it to a large group of employees assembled for the safety meeting. *Impact Industries*, 285 NLRB 5, 6 (1987), *re-manded* on other grounds 847 F.2d 379 (7th Cir. 1988) ("employer's unlawful conduct is heightened when it is committed by the highest-level management official").

Finally, we find that Respondent violated Section 8(a)(1) by telling employees that its customer, Texas Utilities, could terminate its contract with Respondent, and all of Respondent's employees could lose their jobs, if the Union won the election. Respondent's contract with Texas Utilities (TXU) was the impetus for opening the Joshua, Texas office and for hiring the initial group of welders which included Stacy and Vickery.

As stated in *Gissel*, above at 618, an employer may make a prediction as to the precise effects he believes unionization will have on his company, but that prediction must be carefully phrased on the basis of objective fact to convey the employer's belief as to demonstrably probable consequences beyond his control. While it is true that Respondent's contract with Texas Utilities was cancelable after 60 day's written notice,⁶ Respondent offered no evidence that TXU had ever indicated that it would cancel its contract if Respondent's employees became unionized. Indeed, the only evidence on this point, offered in response to the judge's questioning (but not specifically discussed in the judge's decision), was President Tellepsen's testimony that: he participated in the negotiation of the contract with TXU; there was discussion concerning the 60-day cancellation clause; he asked TXU what circumstances might cause TXU to cancel the contract; TXU *generally* referred to performance and economics; and that TXU *did not say* that it

might cancel the contract if Respondent's employees became unionized. Thus, Respondent did not demonstrate any likelihood whatsoever that TXU would cancel its contract upon unionization, and it therefore did not demonstrate any objective basis for harboring such a belief. Consequently, Respondent's remarks were not a permissible prediction, but an implied threat that introduction of the union would cause insecurity, loss of employment, or complete elimination of Respondent's Joshua operations.

Moreover, Respondent's remarks must be viewed in the context in which they were made. Supervisor Redman told employee Stacy that union representative Leon Loggins was the reason Stacy was laid off, in the next breath told him that TXU would terminate its contract with Respondent if the Union won the election, and finished with the comment that all employees could lose their jobs if the union won the vote. The implied link between union activity, TXU's termination of its contract, and employee job loss, was quite clear and was surely not lost upon Stacy. This was not an employer's noncoercive statement of its economic and competitive position (compare *Freeman Mfg. Co.*, 148 NLRB 577 (1964)), but a communication intended to—and likely to—instill in employees a sense of fear that unionization would inevitably result in loss of business and thus loss of their jobs. *Mason, Carl T., Co.*, 142 NLRB 480 (1963); *R.D. Cole Mfg. Co.*, 133 NLRB 1455 (1961). Accordingly, we find no merit in Respondent's exceptions as they relate to these 8(a)(1) violations.

Our dissenting colleague argues that simply because Redman's statements to Stacy were phrased conditionally—that TXU *could* terminate its contract and that employees *might* lose their jobs—they could not be unlawful. It is not strictly necessary to pass on the issue: given the other unlawful statements here, this basis for finding a violation of Section 8(a)(1) is cumulative. Nevertheless, consistent both with *Gissel* (where the employer predicted a strike that "could lead to the closing of the plant") and with our earlier decisions, we reject the idea that the potentially coercive character of an employer's predictive statements turns on the semantic distinction between "would" and "could."⁷ See *Gissel*, above, 395

⁵ To conform the judge's finding to Vickery's testimony, as actually credited by the judge, we modify the judge's recommended Order and Conclusion of Law 3(b) to read "would" rather than "might" lose their jobs.

⁶ The termination clause reads in pertinent part:

[Customer] may terminate this Agreement, at [customer's] sole discretion, at any time, by providing sixty (60) days prior written notice of such termination to [Respondent] It is expressly understood that [customer's] right of termination is absolute and that no cause for termination need exist or be shown.

⁷ We also disagree with our dissenting colleague's reliance on the absence of evidence that Redman's statement to Stacy was disseminated to other employees. We find Redman's statements—that TXU could terminate its contract with Respondent, and all of Respondent's employees could lose their jobs, if the Union won the election—to be tantamount to a threat of plant closure in the event of unionization. The Board's traditional practice is to presume dissemination of such threats, absent evidence to the contrary. *Spring Industries*, 332 NLRB No. 10 (2000) (then-Member Hurtgen dissenting in pertinent part). There is no evidence to the contrary.

U.S. at 588; *Daikichi Sushi*, 335 NLRB No. 53, slip op. at 2–3 (2001). A prediction of adverse consequences of unionization, however it is formulated, must have an objective basis. See, e.g., *Blaser Tool & Mold Co., Inc.*, 196 NLRB 374 (1972) (finding unlawful company president’s statement that major customer was free to withdraw patronage at any time). Redman had no such basis for connecting the union’s election victory to cancellation of the contract—whether as a possibility, a probability, or a certainty. The decision cited by our colleague, *CPP Pinkerton*, 309 NLRB 723 (1992), has no application here, because the Board never passed on whether there was an objective basis for the statement in that case and because it did not occur in the context of other, unlawful statements.

2. The judge found that Respondent violated Section 8(a)(1) by “[c]oercively interrogating employees about their Union sympathies and activities and those of their friends.” This finding relates to the complaint allegation that Supervisor LaBuff, at Morehead, Texas,⁸ interrogated employees about their union membership and/or sympathies.

The judge credited employee Word’s testimony that Supervisor LaBuff asked him how he was going to vote in the election and told him that if he joined the Union he could no longer work on that job. The judge also credited Blacksher’s testimony that LaBuff stated, in the presence of employees Word and Frank Howard, that he was not going to hire any union employees. The judge generally credited Blacksher as a “truthful witness,” and Blacksher additionally testified that he observed LaBuff ask Word and Howard how they were going to vote. Finally, the judge credited Blacksher’s testimony that Supervisor LaBuff asked him whether some of his friends were union members. This interrogation occurred in Berea, Kentucky, when, after Blacksher was visited by two union agent friends, LaBuff questioned Blacksher regarding their union affiliation.

The judge, citing *Rossmore House*⁹ and what have come to be known as the “*Bourne* factors”¹⁰ cited therein, found that LaBuff did not communicate any reason for his interrogations to employees and that, not only did LaBuff not give assurances against reprisals, reprisals in fact occurred. Accordingly, the judge found that LaBuff’s interrogations violated Section 8(a)(1).

⁸ The complaint incorrectly referenced Morehead, Texas, when it should have referenced Morehead, Kentucky.

⁹ *Rossmore House*, 269 NLRB 1176 (1984), affd. *Hotel Employees & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

¹⁰ *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964).

Respondent excepts, again denying, on credibility grounds, that LaBuff interrogated employees. Respondent argues, alternatively, that, even if LaBuff made the statements attributed to him, those statements or questions do not rise to the level of unlawful interrogation. Finally, Respondent argues that Blacksher, one of the individuals questioned, was a supervisor and that statements to him do not violate the Act.

We adopt the judge’s finding of a Section 8(a)(1) unlawful interrogation violation based on Word’s credited testimony.¹¹ We find it unnecessary to supplement this violation by additionally relying on Blacksher’s credited testimony that LaBuff asked him in Berea whether some of his friends were union members. The judge, while acknowledging that Blacksher had “some of the indicia of supervisory status” at Berea, made no definitive finding as to Blacksher’s supervisory status. Because the record establishes a 8(a)(1) violation by LaBuff independent of the Berea incident involving Blacksher; because of Blacksher’s asserted, and unresolved, supervisory status;¹² and because a finding of a violation based on the Berea incident would be cumulative, we find it unnecessary to pass independently on the LaBuff/Blacksher “friends” conversation. Accordingly, we modify the judge’s recommended order and corresponding Conclusion of Law to delete the phrase “and those of their friends,” which refers to the Berea conversation.

3. The judge found that Respondent violated Section 8(a)(3) by terminating employees Scott Stacy and Jimmie Vickery on June 14 and July 29, 1999, respectively.¹³ Respondent excepts as to both employees. Regarding Stacy, Respondent argues that the judge failed to consider facts supporting Respondent’s position that, after Stacy engaged in a slowdown, he quit his job to preserve his long-term friendships with Redman and General Manager James (Rick) Morris. Regarding Vickery, Respondent asserts that the judge failed to consider facts supporting Respondent’s position that Vickery was laid-off due to reduced work and that Vickery’s lay-off was consistent with the past practice of Vickery being

¹¹ In upholding the violation, we note that the judge found a plural violation (i.e., “interrogating employees”); that the judge generally credited Blacksher and Word as “truthful witnesses”; and that there is additional record evidence, not specifically cited by the judge, which supports the plural violation.

¹² Interrogation of a supervisor about union status does not violate Sec. 8(a)(1) because it does not interfere with, restrain, or coerce employees in the exercise of Sec. 7 rights. *Pioneer Hotel*, 276 NLRB 694, 702 (1985). Cf. *Simpson Electric Co.*, 250 NLRB 309 (1980); *Nemocolin Country Club*, 291 NLRB 456, 460 (1988), enf. 879 F.2d 858 (3d Cir. 1989) (comment by one supervisor to another unlawful *when made in presence of employees*).

¹³ At the time the complaint issued on October 29, 1999, Vickery had not returned to work: he returned on November 8, 1999.

laid-off for at least 10 weeks every year. It is clear from the judge's decision that the judge considered, but rejected, Respondent's positions. For the reasons stated by the judge, we uphold the judge's 8(a)(3) findings.

ORDER

The Respondent, Tellepsen Pipeline Services Company, Houston, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that they are being laid off because of their union activities.

(b) Telling employees that Texas Utilities could terminate its contract with Respondent if the Union won the election, that the employees would lose their jobs, and that Respondent would close down the business.

(c) Coercively interrogating employees about their union activities and sympathies.

(d) Discharging, laying off, or otherwise disciplining employees because of their union activities and sympathies.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Scott Stacy reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Scott Stacy and Jimmie Vickery whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Scott Stacy and Jimmie Vickery, and within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

(e) Within 14 days after service by the Region, post at its facility in Houston, Texas, copies of the attached notice

marked "Appendix."¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 1, 1999.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

DIRECTION OF SECOND ELECTION

IT IS FURTHER DIRECTED that Case 16-RC-10120 is severed and remanded to the Regional Director for Region 16 for the purpose of conducting a new election at such time as he deems appropriate. A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Any employee unlawfully discharged shall be eligible to vote. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently re-

¹⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

placed. Those eligible shall vote whether they desire to be represented by Pipeliners Local Union No. 798.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

Dated, Washington, D.C. September 24, 2001

Wilma B. Liebman, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN HURTGEN, dissenting in part.

I agree with my colleagues that *Gissel*¹ is the governing law regarding the lawfulness of employer predictions about the consequences of employee unionization. However, contrary to my colleagues, I do not find that Supervisor Redman's statements to employee Stacy that Respondent's client *could* terminate its contract with Respondent if the Union won the election, and that employees *might* lose their jobs, violated Section 8(a)(1) under *Gissel*.

The lawfulness of predicting the loss of a customer and resulting employment reductions depends upon whether the loss is portrayed as a threat of retaliation for unionizing. With respect to a closing resulting from third-party action, recent Board cases distinguish between remarks describing the *possibility*, rather than the *inevitability*, of action. Compare *CPP Pinkerton*, 309 NLRB 723, 724 (1992) (preelection letter stating that "client is completely free to cancel our contract and take its business

elsewhere. Then we would no longer have any jobs" found to be a lawful statement of opinion) with *Reeves Bros, Inc.*, 320 NLRB 1082 (1996) (statements that, in the event of unionization, customers "*would* remove their business and, as a result, employees would probably work fewer hours" overstated customers' positions and were unlawful threats).²

My colleagues seek to distinguish *CPP Pinkerton* on the ground that the Board did not pass on whether there was an objective basis for the statement there. But that is my essential point. The Board did not have to pass on this issue because the statement was an opinion as to what *could* happen, not a threat as to what would happen.

In the instant case, Redman did not say that TXU *would* terminate the contract. Redman said that TXU *could* do so. The same thought was repeated when Redman said that employees *might* lose their jobs. Thus, Redman was simply asserting what a third party could do. And, under the terminable contract between Respondent and TXU, Redman's statement was indisputably correct. In sum, Redman was not threatening action by Respondent; he was only saying what TXU could do.

As to my colleagues rendition of the context in which Redman's remarks were made, I note that Redman was a low-level supervisor, and, as the judge noted, a "close personal friend" of Stacy's. They had attended the same high school; hired each other for jobs; Redman was in one of Stacy's weddings; and Redman had been a pall-bearer at a Stacy family funeral. I thus view Redman's remarks to Stacy more in the nature of explaining Respondent's actions on a friend to friend basis, than as a Respondent implied threat of job loss. Moreover, Redman's statement was made to Stacy alone in a telephone conversation and was not disseminated among other employees.

In light of the above, I would not find a violation based on this conversation.

I do not agree that Respondent's layoff of employee Vickery was unlawful as of July 29. However, I concur with the judge and my colleagues that Respondent subsequently violated Section 8(a)(3) as to Vickery. The complaint alleged: (1) Respondent terminated Vickery on or about July 29, 1999, and (2) Respondent, by Bill Bettis, on August 11, 1999, told an employee (apparently Vickery) that he was being laid off because of his union and protected, concerted activities. The only arguably protected, concerted activity that Vickery engaged in,

¹ *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

² See also my partial dissent in *Daikichi Sushi*, 335 NLRB No. 53, slip op. at 6 (2001) (collecting cases) (no threat of reprisal in statement that Respondent's East Coast operation "*might* be unable to continue in the event of unionization because [Respondent] would lose its ability to compete successfully").

and that Respondent knew about prior to July 29, 1999, was speaking up at the July 14, 1999 safety meeting. It is undisputed that other employees spoke up at the safety meeting and suffered no adverse consequences. It is also undisputed that Bettis laid off three of his four-member welding crew on July 29, 1999, because, as Vickery himself admitted, "there was just very little work to do." Thus, assuming that Vickery's safety meeting conduct was protected, concerted activity and that a prima facie case has been established, I would find that Respondent met its *Wright-Line* burden³ of showing that Vickery would have received the same treatment on July 29, 1999, even in the absence of this activity.

However, the judge credited Vickery's testimony that he told Respondent that he was reconsidering his decision to vote in favor of the company. Bettis testified, without contradiction, that he learned of this after the July 29 layoff. The judge further credited Vickery's testimony that Bettis told him (apparently on August 11) that his [Vickery's] reconsideration of his vote was why he could no longer work for the company. Thus, it appears, upon learning of Vickery's "reconsideration," Respondent determined, sometime after July 29, not to re-hire Vickery and effectively communicated this to Vickery on August 11. Respondent thereby converted what might have begun as a nondiscriminatory layoff into a discriminatory termination. However one characterizes the adverse action taken against Vickery (and it has been characterized variously as a termination, lay off, furlough, and failure to recall earlier), at bottom, as the judge stated from the bench, "... Vickery was let go for this period of time, until he was reinstated after the complaint was filed, for discriminatory reasons."

In these circumstances, I do not agree that Vickery's layoff on July 29 was unlawful. However, I agree that Respondent subsequently converted the layoff into a termination and that it did so for discriminatory reasons.⁴

Dated, Washington, D.C. September 24, 2001

Peter J. Hurtgen,

Chairman

NATIONAL LABOR RELATIONS BOARD

³ *Wright Line*, 250 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982).

⁴ I would leave to compliance the precise date of the conversion.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT tell employees that they are being laid off because of their union activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Pipeliners Local Union No. 798 or any other union.

WE WILL NOT tell employees that Texas Utilities could terminate its contract with us if you vote for a union, that you would lose your jobs, or that we would close down the business.

WE WILL NOT coercively interrogate you about your union activities or sympathies.

WE WILL NOT in any like or similar manner interfere with, restrain, or coerce you in your exercise of the rights guaranteed you by the Act.

WE WILL, within 14 days from the Board's Order, offer Scott Stacy full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges.

WE WILL make whole employees Scott Stacy and Jimmie Vickery for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Scott Stacy and Jimmie Vickery, and, WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

TELLEPSSEN PIPELINE SERVICES CO.

Elizabeth Kilpatrick, Esq. and Linda Reeder, Esq., for the General Counsel.

Matthew R. Robbins, Esq. (Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman), for the Charging Party.

David C. Lonergan, Esq. and Patricia S. Gill, Esq. (Worsham, Forsythe & Wooldridge, LLP), for the Respondent.

BENCH DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge: The original petition in Case 16-RC-10120 was filed on June 7, 1999,¹ by Pipeliners Local Union No. 798 (the Union, or Petitioner). Following a stipulated election agreement, an election was held on August 10. Of 29 valid votes cast, 12 were cast for the Petitioner, and 17 against it. The Petitioner filed timely objections to the election. The Union filed the original charge in Case 16-CA-20035 on August 17, and an amended charge on September 14. The complaint issued on October 29, and alleges that Respondent engaged in various actions violative of Section 8(a)(1) of the Act, and, as amended at the hearing, that it violated Section 8(a)(3) by terminating the employment of Scott Stacy and Jimmie Vickery because of their union activities. I heard this case in Fort Worth, Texas, on December 8, 9, and 10, and, on the latter date, issued my bench decision finding that Respondent had violated the Act. I certify the accuracy of the portion of the transcript, pages 471 through 517, containing my decision, and I attach a copy of that portion of the transcript as "Appendix B."

A.Scott Stacy

1.Summary of the evidence

Respondent hired Scott Stacy on June 7, for pipeline construction work at Riesel, a small town near Waco, Texas. Construction Supervisor Robert Redman, Stacy's close personal friend for many years, hired him. Redman had hired Stacy for previous jobs at other sites for the Company, and for other construction companies. In turn, Stacy had been in a position to hire Redman for other companies. Respondent's contention is that Stacy was not discharged soon after being hired, but that he quit in order to preserve his friendship with Redman. Stacy was a member of the Union, and Redman knew this.

As noted, the representation petition was filed on the June 7, the day that Stacy started work on the Riesel job. The foreman at the job was Kirk Carter. On June 8, Union Business Agent Leon Loggins visited the jobsite, and spoke briefly with Stacy and Carter. The latter ordered Loggins to leave the site. Stacy and Loggins had lunch on June 10, and Carter later told Stacy that Loggins was not allowed on the site.

On about June 13, Stacy asked Carter for permission to visit his stepmother, who was scheduled to undergo surgery. Carter granted this request. Stacy testified that his welding machine broke down on June 14, and that this prevented him from working. Carter told Stacy to call Redman. Stacy did so. According to him, Redman told him to go home, repair his welding machine, and call Redman back on June 16 if he was ready to

return to work. Redman testified, and acknowledged that he told Stacy to get his welding machine fixed. However, he denied telling Stacy to call him back when he was ready to return to work.

Stacy had another welding machine at home. He testified that he called Redman on June 16, and said that he was ready to go back to work. Redman replied that General Manager James (Rick) Morris wanted to know "what the fuck this hearing was all about." Notice of hearing in the representation case had issued on June 10. Redman told Stacy, according to the latter, that he had "caught a lot of flak" since hiring Stacy, and another employee. It seemed "damn funny" to Redman that the Company did not have any union problems until he hired Stacy and the other employee. He told Stacy that he could not put him back to work until Redman had talked again with Morris, and that he would call Stacy on June 20.

Redman agreed that Stacy called him on June 16, but gave a different version of the conversation. Stacy said that the Union had asked him to "do something" at the jobsite, that he was "slowing down," and "disrupting the work flow." Accordingly, Stacy felt that his returning to work might jeopardize his friendship with Redman. The General Counsel introduced a "termination statement" stating both that Stacy had been "terminated" on June 9, and that he had "left on own accord to keep from getting caught up in labor controversy." The document was signed by Redman, and, purportedly, by Stacy. The latter denied seeing the document prior to the hearing, and denied that the signature was his. Redman acknowledged signing Stacy's name.²

General Manager James (Rick) Morris testified that he was "hot" about the union trouble. He stated that Redman called him and said that he had received a call from Stacy saying he was ready to come back to work.³ Morris asked Redman whether he needed Stacy, and Redman answered, "No." Morris replied that he did not have any place for any employees at that time, but denied telling Redman to keep Stacy off the payroll. Redman did not call Stacy on June 20, as he said he would do. Accordingly, Stacy called Redman. He testified that Redman said that Morris told Redman to leave Stacy at home because he was too involved in union business.

Stacy testified that he called Redman again on June 25, and inquired about some "tie-ins" that Stacy had installed. Redman replied that they had gone in "perfect," and that Stacy had done a good job. He added that Rick Morris had "cooled off", and that Loggins was the reason that Stacy was "laid off." Redman further stated that Respondent's client for whom it was performing the services (Texas Utilities) could terminate Respondent's contract if the Union won the election. Stacy asked about another union member, and Redman replied that all of Respondent's employees could lose their jobs if the Union won the election.

Nanette Stacy, the wife of alleged discriminatee Scott Stacy, was an employee at a bank where Redman was a customer. She testified that, on June 25, Redman approached her desk in the lobby and asked her what her husband was doing. She re-

¹ All dates are in 1999 unless otherwise indicated.

² GC Exh. 2.

³ This contradicts Redman's testimony.

plied that he was looking for work, and added that he would not slow down Redman's work. "I know," Redman replied. "Pounding" his finger on Mrs. Stacy's desk, Redman stated, "You can thank Mr. Loggins for Scott not working. If Mr. Loggins hadn't talked to Mr. Carter and talked to Scott he'd still be working and everything would be okay." Mrs. Stacy asked whether the Company had other union employees. Redman first replied that it did, but then added that the Company had obtained the contract involving the work at Riesel on the ground that it did not have union employees. Mrs. Stacy made notes of this conversation. On cross-examination, she stated that Redman had said, while visiting at her home, that the Union was trying to slow down work at another job. Her husband commented that he would be in an awkward position if the Union asked him to slow down on *his* work. He said he did not know what he would do, but Mrs. Stacy did not recall his saying that he might quit. Asked why she did not keep notes of *this* conversation, the witness replied that it did not impress her, and "no one was tapping their finger on (her) desk." Redman testified that he told Mrs. Stacy that she could thank Leon Loggins for causing the disruption of service, which was responsible for her husband not being able to work there.

Foreman Kirk Carter testified that, when Leon Loggins showed up at the Riesel jobsite on June 8, he talked to Stacy and that the latter "slowed down." Stacy denied this. He agreed that he read a union magazine saying that union members should not work at the jobs Respondent was performing, but denied that union agent Loggins ever said anything to him about it.

Carter also testified that James Tilley, an employee of the client for whom Respondent was performing services (Texas Utilities) approached the jobsite and started talking with Carter at a time when welding was going on and Stacy was working. Stacy handed Tilley a union sticker, whereupon Carter moved his conversation with Tilley 50 yards away. However, Stacy followed them, and made negative comments about working for Respondent.

Stacy denied that he was working when Tilley appeared—he was waiting for a ditch to be dug. He had known Tilley for some time, and gave him a union sticker. He told Tilley to put it on his bathroom mirror, not his hard hat—everybody laughed. Stacy denied that Carter told him to go back to work.

Tilley testified that Kirk and several employees, including two welders, were in a ditch when he arrived. There was general conversation, and Stacy said that they were trying to get a Union started. Carter then took Tilley about 50 yards away. Stacy followed them, and gave Tilley a union sticker. Tilley put it in his pocket. It was a friendly conversation—"nobody was mad at anybody."

Stacy testified that he did not receive any discipline or verbal counseling while employed by Respondent. He denied engaging in a work slowdown. Redman testified that the Riesel job finished by the date scheduled for completion.

2. Factual conclusions

It is undisputed that the representation petition was filed on June 7, and that notice of hearing issued on June 10. It is also undisputed, based on Morris' testimony, that Redman called the

general manager, and that Morris said he was "hot" about the Union. There is no evidence of any discipline of Stacy. Stacy's testimony that Redman told him he had done a good job is uncontradicted. The Company's assertion of a "slowdown" by Stacy was first made after business agent Loggins appeared at the jobsite and asked for Stacy. Based on Stacy's believable demeanor and the consistency of his testimony with the foregoing undisputed facts, I credit his statement that Redman told Stacy that general manager Morris asked Redman "what the fuck this hearing was all about," 6 days after the notice of hearing issued. The General Counsel has established animus against the Union by the Company.

I credit Stacy's testimony that he called Redman on June 16 as requested, and that he said he was ready to return to work. I do not credit Redman's denial that Stacy asked to come back to his job. Redman's credibility as a witness is significantly damaged by his admission that he signed Stacy's signature on the termination document. I credit the completely trustworthy testimony of Nanette Stacy that Redman, "pounding" her desk at the bank, stated that she could thank Business Agent Loggins for Stacy's no longer working, and that Stacy would still be working if Loggins had not talked to Stacy and foreman Carter. Although Mrs. Stacy acknowledged that Redman had claimed that there was a slowdown, and that her husband had said he would be in an awkward position if the Union asked him to engage in such conduct, there is no credible evidence that the Union made such a request or that Stacy said he would quit if it did so.

There is no credible evidence that Stacy engaged in any "slowdown" or "disruption of services." Business agent Loggins appeared at the jobsite, talked briefly with Stacy and Carter, and was ordered by the latter to leave. Stacy's testimony that he was not welding, but was waiting for a ditch to be dug when Tilley appeared, is supported by Tilley's testimony that all the employees, including foreman Carter, were in a ditch when he arrived. This is consistent with Stacy's testimony that he did not stop welding—the job which he performed—when he gave Tilley a union sticker. Everybody laughed, and there was no animosity. A conclusion that there was no slowdown is further supported by the fact that, a few days before, Carter gave Stacy permission to visit his ailing stepmother. It is unlikely that he would have done so if there had been a dire need for Stacy's services. Finally, Redman acknowledged that the Riesel job finished on time. I conclude that Respondent's evidence is fabricated.

I credit Stacy's testimony that Redman, an admitted supervisor, on June 20 told him that general manager Morris had told Redman to leave Stacy at home because he was involved in union business, and, on June 25, told him that Texas Utilities could terminate Respondent's contract if the Union won the election, and that all the employees could lose their jobs.

B. Tracy LaBuff

1. Summary of the evidence

Tracy LaBuff was an admitted supervisor at various projects, one of them at Beria, Kentucky. Keve Blacksher Jr. was a foreman at the Beria jobsite. He had some of the indicia of supervisory status, but voted in the election and was not

claimed as a supervisor by the General Counsel. Blacksher testified that LaBuff asked him whether he had a union card, and stated that he was not going to hire any union employees. LaBuff made the latter statement, according to Blacksher, in the presence of employees Jimmy Word and Frank Howard. Word testified that LaBuff told him that if he joined the Union he could no longer work on that job.

Blacksher further affirmed that he talked with some "old friends," and LaBuff asked whether they were union members. According to Blacksher, LaBuff wore a pistol.

In mid-summer, Blacksher and Word were transferred to a job at Morehead, Kentucky, where LaBuff was also the supervisor. Some of the employees received union books, and placed union stickers on their cars. Blacksher testified that LaBuff stated that Respondent's owner, Howard Tellepsen, had said that he would shut the doors on the business before he would "go Union." Word testified that LaBuff said, before the whole crew at Morehead, that Tellepsen had said he would shut the job down before he would go Union. Word also testified that LaBuff asked him how he was going to vote in the election. Word is still employed by Respondent, according to LaBuff.

Blacksher testified that LaBuff said he would have to fire Jimmy Word because he had made some "bad welds." According to Blacksher, the welds in question had actually been made by another employee.

LaBuff denied most of the testimony by the General Counsel's witnesses. Thus, he denied talking about the Union with Blacksher. The latter did tell him that a union representative would like to meet with him, but LaBuff declined the invitation. LaBuff denied telling employees that they would lose their jobs if the Union won, or that the Company would shut its doors in the event of a union victory, or that Tellepsen had said this. He denied making a mistake in attributing bad welds to Jimmy Word, but knew that he was pro-union. LaBuff acknowledged that he owned a gun, but contended that he kept it in a trailer park in Berea. The reason he had the weapon, LaBuff stated, was that he carried a lot of cash to pay for Company expenses.

Vernon Freeman worked as a welder for Respondent in 1999, first in Berea, then Catfish, and then in Morehead. Freeman was not a union member. Blacksher was his foreman at the Morehead job. Freeman testified that Blacksher, Jimmy Word, and Frank Howard were working at a different area at the Morehead jobsite. He stated that LaBuff did not ask him whether he supported the Union, nor did LaBuff talk about the Union before the entire crew.

2. Factual conclusions

Blacksher and Word impressed me as truthful witnesses. They are employed from time to time by Respondent, and it is unlikely that they would jeopardize this avenue for employment by testifying falsely against the best interest of Respondent. LaBuff was a less reliable witness. It is difficult to understand how his possession of a gun at his Berea trailer would protect the cash, which he claimed to have to pay Company bills, unless he paid them in his trailer. Freeman's testimony is essentially what he did *not* hear. This does not expressly contradict what Blacksher and Word affirmed they *did* hear. Further,

Freeman did not work at the Morehead job in the same area as Blacksher, Word, and Howard. I conclude that the testimony of Blacksher and Word has more probative weight, and find that LaBuff made the statements attributed to him. I also credit Blacksher's testimony that LaBuff asked him whether some of his friends were union members, and Jimmy Word's averment that LaBuff asked him how he was going to vote in the election.

C. Jimmie Vickery

1. Summary of the evidence

Jimmie Vickery was a welder assigned to the crew of Supervisor Bill Bettis. Vickery was not a member of the Union, and Bettis was aware of this fact. Vickery had informed him that he was "leaning" toward the Company in the forthcoming election. There was a safety meeting on—July 14, which was addressed by Company owner Howard Tellepsen. Several employees asked questions. Vickery asked why the welders had to stay two to a room (for which the Company paid). Vickery testified that Company Manager Rick Morris was nearby, and became "agitated" about Vickery's asking questions directly to Tellepsen.

On the next or the following weekend, Vickery received a telephone call from another welder saying that Rick Morris had told Bill Bettis that he did not want to see Vickery's name on another time sheet. Vickery testified that he told his foreman, Eldon Scrabanick, about this call. The foreman replied that he had not heard anything from Tellepsen or Morris. Vickery told Scrabanick that he had learned that the Company would hire half of the welders who supported the Union if the latter won the election. Accordingly, Vickery told Scrabanick, he was unsure of his sympathies and was "reconsidering" his vote. The General Counsel contends that it was this statement which led to Vickery's layoff.

On July 29, Vickery spoke to Supervisor Bill Bettis about his conversation with the welder who attributed a statement about Vickery to General Manager Morris. Bettis replied that the welder did not know the facts about the matter. Everything was "okay" according to Bettis.

The Company was then completing a job near Dallas, the "McComus Bluff Landfill" and laid off all the welders except one. The next job was one near Sulphur Springs, Texas, and involved "a lot of fabrication" according to Bettis. Vickery testified that he called Bettis a few days before the election (August 10) and asked whether Bettis wanted him to go to the Sulphur Springs job. Bettis "hum-hawed," and said that he would not be needing Vickery for some time. Several of the welders with whom Vickery had worked on the landfill job were recalled to the job at Sulphur Springs. On re-cross-examination, Bettis was asked whether he knew that Vickery had formerly been against the Union when he (Bettis) repeated to Vickery what Eldon (Scrananick), his foreman, had told Bettis about Vickery reconsidering his vote. Bettis replied that it was public knowledge. Complaint in this case issued on October 29, alleging that Vickery had been discriminatorily terminated. He was recalled a week later, on November 8.

Bettis claimed that various welders had been laid off for 10 weeks in 1998, and that Vickery was one of the last to be recalled. He could not recall the details, but claimed that the

reason was Vickery's asserted reluctance to do physical work. Bettis testified that Vickery was a good welder, and acknowledged that he had a "particular talent" for fabrication in construction work. Bettis admitted that Vickery performed physical work when asked to do so.

2. Factual conclusions

Although Bettis claimed that it was Vickery's alleged reluctance to do physical work which was the reason he was not recalled at an earlier date, Bettis admitted that Vickery would perform such work when asked to do so. The timing of Respondent's failure to recall Vickery to the Sulphur Springs job—immediately after learning that Vickery was reconsidering his vote—suggests that this was the real reason. This inference is buttressed by the fact that the Sulphur Springs job involved fabrication, one of Vickery's specialties. The fact that the Company *did* have work in 1999 in which Vickery specialized differentiates it from the 10-week period in 1998 to which Respondent refers; Bettis could not recall the details of the alleged 1998 layoffs, matters which would normally be found in the Company's records. Respondent has not established a custom of laying off Vickery when work in which he specialized was available. Accordingly, an inference is appropriate that it did so in 1999 when, as a formerly pro-company employee, Vickery announced that he was reconsidering his vote. After the complaint issued, alleging that the layoff was discriminatorily motivated, Vickery was promptly recalled.

D. Howard Tellepsen

1. Summary of the evidence

The complaint alleges that Company owner Howard Tellepsen told employees that they would lose their jobs if the Union won the election. Jimmie Vickery testified that he heard Tellepsen say, at the safety meeting, that the only reason the Company had the projects was the fact that it was not Union, and that there would be no jobs if the Union won the election. Keve Blacksher and Jimmie Word testified that supervisor Tracy LaBuff said Howard Tellepsen told employees that he would shut the business down before he would "go Union."

Howard Tellepsen denied making the foregoing statements. He testified that he compared the "Union's culture" with the "Company's culture." The latter included multi-craft, "flexible" wage rates. Tellepsen said that this plan did not fit with the Union's culture in terms of working conditions and workforce. The Company did not want to have to bid on a job with the same customer after finishing a job—it wanted to do all of the client's work under a multi-year contract, essentially to become Texas Utilities' pipeline service contractor. Tellepsen testified that one employee asked whether the Company could guarantee the workers employment. He replied that the Company could not do so because of its contract. The latter was cancelable upon 60-day notice from Texas Utilities, and that was why the employees were at the safety meeting.

2. Factual conclusions

The issue is whether Tellepsen told employees at the safety meeting that the employees would lose their jobs if the Union won the election. Vickery gave direct testimony that he heard

Tellepsen say this to employees, while Keve Blacksher and Jimmie Word asserted that Supervisor Tracy LaBuff attributed the same or similar statements to Tellepsen. Although the latter denied making the statements, his Company "culture" would have made any meaningful relationship with the Union difficult if not impossible. If Respondent became bound to a multi-year contract which could be terminated by a notice from Texas Utilities, this would undoubtedly contradict the terms of any collective bargaining agreement with the Union. Tellepsen's admitted statements thus lead to a probable conclusion similar to that of the General Counsel's witnesses—use of union labor might result in a shutdown of the job. I credit the testimony of the General Counsel's witnesses.

E. Legal analysis

The statements of Respondent's supervisors that an employee was being laid off because of his union activities, and that the employees might lose their jobs and Respondent would close its doors if the Union won a forthcoming election, violated Section 8(a)(1).

In addition, Supervisor LaBuff asked Blacksher whether any of his friends were union members, and asked Jimmy Word how he was going to vote in the election. The Board has held that the test of the illegality of interrogation is whether, under all the circumstance, it reasonably tends to interfere with, restrain, or coerce employees in the exercise of rights guaranteed by the Act. *Rossmore House*, 269 NLRB 1176 (1984). The Board stated that some of the factors to be considered are the background, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and cited *Bourne v. NLRB*, 322 F.2d 47 (2d Cir. 1964). In that case, the court listed the foregoing factors and added others, including whether a valid purpose for the interrogation was communicated to the employee, and whether the employee was given assurances that no reprisals would be forthcoming. LaBuff did not communicate any reason for the interrogation of Blacksher and Word, and reprisals in fact were forthcoming. I conclude that his interrogations were coercive and unlawful.

The General Counsel has established a prima facie case sufficient to support an inference that protected activity was a motivating factor in Respondent's decisions to discipline Scott Stacy and Jimmie Vickery. Its asserted reasons for doing so are pretextual for the reasons given above. Accordingly, that discipline violated Section 8(a)(3) and (1) of the Act.⁴

In accordance with my conclusions above, I make the following

CONCLUSIONS OF LAW

1. Respondent Tellepsen Pipeline Services Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Pipeliners Local Union No. 798 is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the following conduct, Respondent violated Section 8(a)(1) of the Act:

⁴ *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (9th Cir. 1981), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

(a) Telling an employee that he was being laid off because he was involved with the Union.

(b) Telling employees that its client, Texas Utilities, could terminate its contract with Respondent if the Union won a forthcoming election, that the employees might lose their jobs, and that Respondent would close down the business.

(c) Coercively interrogating employees about their union sympathies and activities and those of their friends.

4. By terminating the employment of Scott Stacy on June 14, and of Jimmie Vickery on July 29, because of their union activities and sympathies, Respondent thereby violated Section 8(a)(3) and (1) of the Act.

5. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

It having been found that Respondent has engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

It having been found that Respondent unlawfully discharged Scott Stacy on June 14, 1999, I shall recommend that Respondent be required to offer him immediate reinstatement to his former position, dismissing if necessary any employee hired to fill his position, or, if such position does not exist, to a substantially equivalent position, and to make him whole for any loss of earnings he may have suffered by reason of Respondent's unlawful conduct by paying him a sum of money equal to the amount he would have earned from the time of his discharge to the date of an offer of reinstatement, less net earnings during such period, to be computed in the manner established by the Board in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).⁵ I shall recommend that Respondent be required to expunge from its records all references to its unlawful discharge of him, and inform him in writing that this has been done, and that these actions will not form the basis of any future discipline of him.

It having been found that Respondent unlawfully terminated Jimmie Vickery on July 29, 1999, but recalled him on November 8, 1999, I shall recommend that Respondent be required to make him whole for any loss of earnings he may have suffered by reason of Respondent's conduct by paying him a sum of money equal to the amount he would have earned from the time of his unlawful discharge to the date of his recall to work, in the manner set forth above. I shall also recommend an expunction order as described above.

Upon these finding of fact and conclusions of law, and on the entire record, I issue the following recommended⁶

⁵ Under *New Horizons*, interest is computed at the "short term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. Sec. 6621. Interest accrued before January 1, 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 281 NLRB 651 (1977).

⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the

ORDER

The Respondent, Tellepsen Pipeline Services Company, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that they are being laid off because of their union activities.

(b) Telling its employees that Texas Utilities could terminate its contract with Respondent if the Union won the election, that the employees might lose their jobs, and that Respondent would close down the business.

(c) Coercively interrogating employee about their union activities and sympathies and those of their friends.

(d) Discharging, laying off, or otherwise disciplining employees because of their union activities and sympathies.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 8(a)(1) of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of this Order, offer Scott Stacy reinstatement to his former position, or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Scott Stacy and Jimmie Vickery, and within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

(d) Make Scott Stacy and Jimmie Vickery whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(e) Within 14 days after service by the Region, post at its facility in Houston Texas, copies of the attached notice marked "Appendix A."⁷ Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of

Board and all objections to them shall be deemed waived for all purposes.

⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 17, 1999.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

The Petitioner's Objections to the election include allegations of conduct by the Employer which have been found herein to have taken place and to have violated the Act. Accordingly, IT IS FURTHER ORDERED that the election in Case 16-RC-10120 is set aside. A second election by secret ballot shall be held among the employees in the unit found appropriate whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Any employee unlawfully discharged shall be eligible to vote. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented by Pipeliners Local Union No. 798.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses. Accordingly, it is directed that an eligibility list containing the full names and addresses of all eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

Dated, Washington, D.C. March 2, 2000

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT tell employees that they are being laid off because of their union activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Pipeliners Local Union No. 798 or any other union.

WE WILL NOT tell employees that Texas Utilities could terminate its contract with us if you vote for a union, that you might lose your jobs, or that we will close down the business.

WE WILL NOT coercively interrogate you about your union activities or those of your friends

WE WILL NOT in any like or similar manner interfere with, restrain, or coerce you in your exercise of the rights guaranteed you by the Act.

WE WILL, within 14 days from the Board's Order offer Scott Stacy full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges.

WE WILL make whole employees Scott Stacy and Jimmie Vickery for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Scott Stacy and Jimmie Vickery, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

TELLEPSSEN PIPELINE SERVICES COMPANY

APPENDIX B

AFTERNOON SESSION (1:00 p.m.)

[Contains pages 471 through 517 portion of transcript]

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JUDGE GROSSMAN: On the record.

I have a suggested format for the presentation of the parties' arguments. I propose that each party be allowed 15 minutes in which to present its principal argument, starting with General Counsel and Charging Party and Respondent, and then in the same order, each party be allowed five minutes thereafter to present an answering argument.

Any disagreement with the format?

MR. LONERGAN: No disagreement, Your Honor. I didn't know that before, when we were preparing these comments. Will you give us a few minutes' warning when we reach close to our 15 minutes?

JUDGE GROSSMAN: Well, unfortunately the way this room is set up, the clock is behind me, instead of in front of me, but I'll try to give a warning. I don't have a bell; I don't have a time clock. I'm not provided with the appurtenances that the Supreme Court has. But I'll try to do that.

MR. LONERGAN: Thank you, Your Honor.

JUDGE GROSSMAN: All right. Is that all right with you, Ms. Kilpatrick?

MS. KILPATRICK: Yes, Your Honor.

JUDGE GROSSMAN: All right. Mr. Robbins?

MR. ROBBINS: Yes, Your Honor.

JUDGE GROSSMAN: This doesn't mean that you have to utilize all the time. If you can state your argument more succinctly, of course, that's perfectly all right.

All right. Well, let's start with you, Ms. Kilpatrick, then.

MS. KILPATRICK: Very well, Your Honor.

CLOSING ARGUMENT ON BEHALF OF THE GENERAL COUNSEL

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MS. KILPATRICK: First of all, I want to put the rest of this evidence in context. If you look at General Counsel's 1(a), you have the starting of the scene with the original petition, dated June 7; notice of hearing, June 10, with a hearing date of June 16; amended petition, June 16, which excludes the ANP welders and includes all the rest of the welders; and finally 1(d), which is the stipulated election dated June 16.

Now, in that context we get to paragraph 7 of the complaint, which involves the allegations concerning 8(a)(1) statements made by Robert Redman, and paragraph 11(a), which involves the termination of Scott Stacy.

And basically, as we've all acknowledged, this involves a credibility determination. And Mr. Stacy has credibly testified that he was told by Mr. Redman that Rick Morris was upset that Mr. Stacy was union, and about the union activity going on elsewhere and wanted Redman to keep Stacy at home.

And the company, on the other hand, has stated that Mr.

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Stacy resigned, based on, frankly, complex, is the best word I can use, divided loyalty theory, that Mr. Stacy's loyalties were divided by—between his union affiliation and his lifelong friendship with Mr. Redman.

It simply doesn't make sense. You know, the facts briefly are that when Stacy took his rig home on June 14, he was instructed by Redman to call him on the 16th and tell him whether or not he can return to work. When Stacy called on the 16th, Redman asked him what was going on with this NLRB hearing.

We've had testimony that Union Representative Loggins was calling, looking for Stacy to go testify at the hearing, and this—Stacy's immediate supervisor Carter had reported this to Redman.

Rick Morris testified that he was pretty upset about the union activities going on at the ANP job, and was concerned that they would be going on elsewhere. If anything, you know, that divided loyalty theory that Respondent's used more describes their opinion of Mr. Stacy than what actually happened.

Basically, Mr. Stacy had worked for TEPSCO before, even though he was a union hand, and there hadn't been any problems. He hadn't been fined by the union. He had never caused any problems on the job. What changed in June? The election petition, and specifically when the weekend before, the few days before the election or the R case hearing in this matter, union representative called the job site, looking for Stacy to testify

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for it.

Respondent didn't like this at all. Morris really didn't like it. Redman didn't like it, and had to figure out some way to keep his friend from getting in serious trouble. He talked to Stacy about it, told Stacy what the problem was, blamed Loggins for Stacy coming, for Stacy coming into trouble, rather, with the union, and told them that the company would shut down and lose the TXU contract if they went union.

Respondent also made some allegations that Mr. Stacy engaged in some slowdowns before he left, which to me contradicts their argument that he was—he left because of his divided loyalty. If his loyalty had been towards the union, he would have stayed and engaged in greater slowdown, if he had done it at all.

The slowdown argument doesn't make sense, in that despite Carter's testimony that the work was slowing down, they were managing to stay on time with the project. In fact, they were in good enough shape that he was able to let Stacy go see his stepmother, who was very ill.

There was another welder coming on the job site within the next day after Stacy left. They weren't in serious trouble. They weren't in any trouble at all.

The allegations that Stacy interfered with the job site and caused disruptions consisted of him supposedly trying to organize the other employees, and the only other welder at the

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job site was Larry Stutts, who was also a welder—a union welder. So there was nobody else left to organize. It was just those two.

His conversation with Mr. Tilley from TXU was pretty much a jovial and friendly exchange, and sounded like it took all of maybe five to ten minutes. I wouldn't call that a huge work disruption.

Now, back to his termination and Mr. Redman's reasons therefor, it doesn't make sense that Mr. Redman would admit to Ms. Stacy the same day he told Mr. Stacy that they could blame the union for Mr. Stacy being out of work. It doesn't make sense that he would do that, if Mr. Stacy quit because he didn't want to divide his loyalties between the union and his friendship with Mr. Redman.

It was pretty obvious from Mr. Redman's testimony that he didn't like having to testify against his friend, and it would be

unreasonable to believe that he would lie to either Mr. or Ms. Stacy when he told them that Stacy was being laid off because of his union affiliation.

Moving on to paragraph 8, which involves the Section 8(a)(1) by Tracy LaBuff, both Keve Blacksher and Jimmy Word testified that LaBuff interrogated employees and told employees that TEPSCO would shut its door if employees voted for the union.

Respondent argues that Blacksher is a supervisor within the

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meaning of Section 2(11) of the Act, and frankly, there is some evidence that Blacksher has some indicia of Section 2(11) status. It's rather complicated, because he did vote in the election, and that issue really wasn't litigated.

It doesn't really matter, however, because the statements and interrogation of other employees made by LaBuff in Blacksher's presence were still violative of Section 8(a)(1). Just because two supervisors are there when an employee, namely Jimmy Word and Frank Howard, when they were interrogated or told that the company would shut its doors, just because another supervisor's there doesn't somehow protect the first supervisor from any unlawful connotations.

Now, LaBuff still made—interrogated Word, and at the time he interrogated Word, they were in Berea, and that time, Word had not placed the union sticker on his vehicle yet, as both Word and LaBuff testified. He wasn't—Word was not an open union adherent under Rossmore House [phonetic] or Sunnyville Medical Clinic, and avoided answering LaBuff's questions.

Therefore, you know, under those circumstances, LaBuff's questioning of Word as to how he would vote if there was an election is clearly coercive under the Act.

And LaBuff attempted to claim that he knew that at least Blacksher was a union hand prior to the Berea and Morehead jobs. However, he testified on cross-examination that he knew

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Blacksher owed the union \$2,000, and because of that, couldn't get his union book back.

And, finally, paragraph 9, Howard Tellepsen's statement to employees that the employer would lose its contract with TXU if the employees voted for the union: To put it in context, the only employees present at the July 14 safety meeting were TXU contract employees. If the TXU contract was cancelled, these employees would lose their jobs.

Under these circumstances, Tellepsen's statement can reasonably be interpreted as a threat that the employees would lose their job if they elected the union. What did he say? Rick Morris testified that Tellepsen said, (a), the contract with TXU could be cancelled. Respondent had the contract because of their flexible workforce and low rates. The union would make Respondent have inflexible workforce and higher rates. And, consequently, Respondent would lose the TXU contract.

Tellepsen testified that he went against the planned program and chose to speak extemporaneously to the employees himself, and he told them, again, the contract with TXU had a 60-day cancellation clause. And interestingly enough, he told them that action by a third party could cancel the contract. And he,

again, said with Morris that the Respondent obtained the contract with a flexible workforce and competitive wage rates, and the union would ruin all this.

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It is reasonable under these circumstances to interpret this as a threat that if the employees elected the union, they would lose their jobs. An example of where the Board has found such statements to be coercive if located in Reeves Brothers, Inc., 320 NLRB 1082. It's a 1996 case, and we have copies here for Your Honor if you would like.

It's especially helpful, because it distinguishes in some circumstances where such statements are acceptable and where they are not acceptable under Board law.

Now, trying to be mindful of time, I'm going to paragraph 10 and 11(c), which involves Jimmie Vickery's termination and the statements from Mr. Bettis that he terminated Mr. Vickery because of his union and protected concerted activities.

Mr. Vickery is a victim of a double whammy. First, he speaks up at the Cleburne meeting on July 14, sort of a ring-leader of the meeting, to corner Mr. Tellepsen and talk to him about problems the welders were having, specifically the hotel problem, and Morris admitted he didn't want to have the welders talking to Tellepsen.

He really didn't want anybody talking to Tellepsen, but he particularly didn't want the welders discussing their problems with Tellepsen at this meeting, and he had instructed Bettis to keep employees from raising their concerns to Tellepsen at the meeting.

Morris said that after he—after that meeting, Morris

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confronted Bettis about it and was pretty hot about the whole thing, didn't appreciate that this had happened.

Not only did Vickery arrange to meet with Tellepsen. He spoke up about the hotel rooms, and other—some of the other welders agreed with him that this was a huge problem. Other welders did speak up during the meeting. One of them, Eddie Mac Hardwick, made—just asked who was able to vote.

And one union employee, Jeff Krantz, made sure that Mr. Tellepsen knew that he was for the company, not exactly the same kind of conduct as arranging the meeting and then raising one of the biggest concerns the welders had.

Now, prior to that and prior to that meeting, Mr. Vickery and Mr. Bettis—I believe even Mr. Morris—testified that it was pretty well known that Mr. Vickery was not a union adherent; didn't plan to vote for the union; really didn't have a problem.

And given his activity alone on the—at the July 14 meeting may or may not have stayed employed. They probably weren't happy with them, but as, you know, Mr. Bettis told him, things were okay. Even though he'd sort of made a fool of Mr. Bettis in front of 200 people, they could live with that.

However, after that meeting, Mr. Vickery confided to his foreman, Eldon Skrabanek, that he felt like he might be changing his vote, because, you know, based on something he'd heard from another employee, Morris was probably going to get rid of him soon, and he felt he might lose his job, and he really didn't know

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which way he was going to go, but he felt like he might change his vote.

A few days later, he was able to talk to Bettis about it, and—about the meeting itself, and Bettis says, Oh, everything's fine, but you be ready, and next week, we're going to be starting a big job in Sulphur Springs, and be prepared; take plenty of clothes, because we're going to have solid work through Thanksgiving.

So on July 29, Jimmie Vickery leaves, thinking that he's furloughed for a week, you know, while they're setting up the job in Sulphur Springs. Well, he calls and learns that he's not on that job. Everybody else on his old crew is on the job. In fact, they've added two new people from another crew, but he's not on there.

So he calls Mr. Bettis and Mr. Bettis says, Well, you know, it's because I found out from Eldon that you were reconsidering your vote, and based on that, you know, I just couldn't have you anymore.

And he said, Well, is it alone. And Bettis said, No, it was the icing on the cake; first, you made a fool of me at that July 14 meeting; then you're reconsidering your vote to go for the union. And Mr. Bettis admits that in his conversation on August 11 with Mr. Vickery, he did tell him that he had learned that Vickery was reconsidering his vote.

It doesn't make sense that Mr. Vickery would not have gone

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to the Sulphur Springs job, but for his reconsidering his vote and his protected concerted activity of the July 14 meeting. Despite Respondent's attempt to classify him as not a very good welder, Mr. Bettis testified that his specialty was fabrication. Sulphur Springs job was heavily involved in fabrication. He could have been used there.

The employees who replaced him there had to come off another crew. It's rather rare, and Respondent also claims that Mr. Vickery was frequently laid off, and I think the record will reflect that Mr. Vickery was laid off a total of two times since December of 1997. One was for about ten weeks, which was a genuine layoff, and then the other was for about a week in January, which could be more classified as a furlough, as Mr. Morris testified. They were waiting to get another job set up.

The ten-week layoff, which occurred sometime in May of 1998, involved a lack of work, and several other employees from Mr. Vickery's crew were also laid off at that time. And when he was laid off in May of 1998, he sure wasn't replaced on his crew by somebody from another crew.

One wonders if Mr. Vickery had been such a bad welder, how he could have stayed on in 1997 for so long and stayed on the same crew, only to have been laid off when there was no work. Even Bettis admitted that Vickery was a good welder, and when asked, helped out with the other jobs.

Mr. Morris cited a safety glass incident at Tri-Cities, but

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he also admitted on cross-examination that that incident was not serious enough to merit any sort of disciplinary action, and it's interesting to note that the other employee who was coun-

seled, for want of a better word, at that time was Eddie Mac Hardwick, who was kept on the job at Sulphur Springs.

On the Sulphur Springs job, there were two welders who were added from other crews, and a couple of the people, it should be noted, who were kept on the Sulphur Springs job, had been hired. I believe one had been hired in March of 1999, and that would be—yes—Keith Huggins was hired in March of 1999 and had not been laid off prior to—had not been employed and was not laid off in the prior job.

So basically the only thing that logically would keep Mr. Vickery from continuing working from the July 29 job until he was re-employed in November after complaint issued in this matter, was his speaking up at the July 14 meeting, and his subsequent statements to Mr. Skrabanek, that he might vote for the union.

Based on the evidence, I believe that it would be reasonable to conclude that all the allegations of the complaint have been supported, and the Judge should find them.

JUDGE GROSSMAN: Mr. Robbins?

MR. ROBBINS: Thank you, Your Honor.

CLOSING ARGUMENT ON BEHALF OF THE CHARGING PARTY

MR. ROBBINS: As you know, this case is a combined

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complaint and objections case. The objections parallel the allegations of the complaint, and they are such that obviously the employees would not have had a chance to, in an uncoerced atmosphere, exercise their right to choose a bargaining representative.

Prior to June of 1999, Mr. Stacy, as he had in the past, returned from mainline job and had been told there would be work for him all summer. Keve Blacksher and Jimmy Word were working up in Kentucky, and nothing was going on with them. Jimmie Vickery had been a long-term employee, started when this company took over the TU project.

By July, Mr. Stacy had lost his job; Mr. Vickery had lost his job; and they'd all been subject to threats that the company would close down if there was going to be a union at TEPSCO. What changed? What changed was there was a petition for an election filed on June 7, a hearing scheduled for the 16th, and an election, with ballots to be counted, on August 10.

I'd like to focus first on the threats. What's interesting about the threats, Your Honor, is that testimony came from four different people, three different locations, involving different management representatives. First, there was Scott Stacy, whose supervisor, Robert Redman, told him in a phone conversation that Texas Utilities would cancel the contract within 30 days if the union got in.

Then was his wife Nanette Stacy, whose notes are part of

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the record here, who was told by Mr. Redman in a separate conversation that TU did not want to have a union.

Then on the other side of the country, in Kentucky, there's Keve Blacksher and Jimmy Word, who don't know anything of Mr. Stacy and his wife. And they're told by Mr. LaBuff that, quote, Tellepsen will shut its door before it will have a union.

This threat was made in front of Blacksher, Jimmy Word, and Frank Howard, the three pro-union welders in Kentucky, who after the Berea job, were set off in a separate area, working by themselves.

Jimmie Vickery, who had nothing in common with either Stacy or Blacksher and Word, went to the captive audience meeting in Joshua. And he testified the same threat was made, that the company would lose its contract with TU if the union got in, and everyone understood what that meant, since TU was basically the only customer of this company.

Now, Mr. Morris, in his testimony, acknowledged that that statement was made by Mr. Tellepsen. He said, Tellepsen said that they could lose their contract if the union gets in. He tried to put a little frosting there by saying, Well, it would be because they were inflexible and not multi-tasked. No basis for saying why they would be that way, but maybe he thought that that would be a nice way to try and push aside what Mr. Tellepsen had said.

Of course, Mr. Morris's testimony is completely—is

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inconsistent with Mr. Tellepsen who claimed he never said anything about losing the contract, even though his own supervisor heard him say something like that.

So I think that it's clear. We have four different people who testified, three different locations, three different management officials, all—the company was sending out the message to the management structure, We'll close down; we'll lose our contract with TU if the union comes in here.

As Your Honor knows, in these situations, the first thing we look at is whether there's an objective basis for the employer's position. The employer has to articulate to the employees its objective basis.

In addition to the cases cited by General Counsel, I'd like to cite to Your Honor, *Dominion Engineered Textiles*, 314 NLRB 571, a 1994 case where the employer said that it would be such a diversion from its task and its plan, that it might have to close the plant; and a second case, *SPX Corporation*, where there were predictions that you'd lose the major customer of the plant if the union got in. *SPX* is at 320 NLRB 219.

There was no basis for—no objective basis for saying that they were going to lose their contract if the union came in. TU never said that. Mr. Tellepsen acknowledged that. Therefore, this is, under well-settled Board law, just a threat to intimidate the employees.

Now, I'd like to take also a look at the threats, the

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interrogation of Mr. Blacksher and Mr. Word, which occurred in the Morehead area, and there we have a credibility issue between those two employees, who testified consistently, and the supervisor, Mr. LaBuff.

I would note in connection with Mr. LaBuff's testimony it was primarily a response to leading questions by counsel. He took what I believe to be the absurd position that, in the midst of a highly contested election, people putting stickers on their cars, everybody knowing a lot was at stake, that he didn't hear any discussion about the union; he didn't discuss it with any-

one; no one discussed it with him. He didn't hear anything about the union. It was like Mr. LaBuff was out there on a different planet from the rest of the workforce.

I submit to you that that's just not a credible claim to make by Mr. LaBuff. In his testimony, he contradicted himself as to whether there were three or five welders working in the Morehead, Kentucky project. What's clear is that after he saw that three of the welders, Blacksher, Word, and Howard, were going to be pro-union, he separated them and put them on a different project from the other welders, and Mr. Blacksher went back to being just a straight line welder.

He acknowledged that a situation in Pitkin, Louisiana, where there were four welders, there would be no foreman. But he had three welders working in Kentucky, and then he wanted to say there was a foreman. The other witness who testified

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claimed, in contradiction to Mr. LaBuff, that he thought there was a foreman in Louisiana. Perhaps he thought that was helping the Employer's case.

Now, I'd like to turn to Mr. Stacy, and I think there are several things that you should consider in determining the credibility of the witnesses here. The Company asserted that this was a quit case. Yet they spent considerable time, trying to show that there was misconduct on the part of Mr. Stacy. Notwithstanding that, as counsel has noted, the project was completed on schedule.

The foreman claimed that Mr. Stacy talked to his partner. He couldn't say how long. He never disciplined foremen in any way. Mr. Redman said he saw nothing to justify even the most modest discipline under this company's procedure.

Mr. Tilley, called as a witness for the Company, testified that there was nothing out of the ordinary. He went there, and he initiated the conversation with the guys working on the project. He and Mr. Stacy had talked back and forth for many years.

Mr. Carter first said, well, Mr. Stacy could have, he believed, got his machine running again. Later he says he doesn't know what's wrong with—he didn't know what was wrong with Mr. Stacy's machine, so totally inconsistent statement there, Your Honor.

Now, we do know also that, consistent with Mr. Stacy's

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version of events, he went to Carter; told him about the breakdown of his machine. Carter wouldn't give him any help. What happened next? Mr. Redman says, I received a phone call from Stacy on Carter's cell phone. That's consistent with Stacy's version of events.

You may also want to consider the assertion that Mr. Stacy quit, when he had been promised work in Texas for the entire summer and had no assurance at that time of employment anywhere else in the United States.

We have the famous quit slip, General Counsel's Exhibit 2, which was not signed by Mr. Stacy. Apparently Mr. Redman decided he should sign for Mr. Stacy. It was—it's an undated termination statement, and the date of the termination, 6/9/99, put on there by Mr. Redman, is a week or more before the con-

versation where he claims the quit occurred. I think that's obviously an after-the-fact fabrication.

Look at the timing, Your Honor. On the day before the NLRB hearing, Loggins calls the hotel and somehow gets in contact with Carter, the foreman, saying he's looking for Stacy. There's —Carter then reports that to Redman. Redman reports that to the big guy, Morris. They all knew about that, and they all acknowledged that they knew that. What happens?

The next morning—the next day, I should say, is when the conversation occurs, where Stacy says he's told, Morris really hot. He didn't say Morris was really hot about what happened,

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claiming that something happened on the ANP project two weeks ago. On the 16th, he says, Morris really hot; I can't call you back to work.

Stacy's version and his testimony was consistent with the testimony of his wife, and consistent with her contemporaneous notes, which are also an exhibit here.

Mr. Redman admits that he did have the conversation with Ms. Stacy. He admits that he did say, Stacy's out of work because of Leon Loggins. He also admits that there was a subsequent conversation, which Stacy put on the 20th, in which Stacy begins the conversation by saying, Were the tie-ins okay on the last work I did before—on my last day of employment there. Redman says, Yes, you did a good job, obviously inconsistent with the whole sabotage, slowdown theory.

What's important about those two things? It shows that there was—the second conversation, where Redman again says, No, I can't call you back; you're done because of what happened; blame it on Mr. Loggins.

And, two, Redman admits the tie-in part of the conversation. Why would Mr. Stacy, who was—if he had quit, be calling back four days later, asking, Well, how did you like the work I did last week. It doesn't make sense, except that Mr. Stacy was hoping to get back to work. That's what was going on.

Finally, you face what I believe was pretty detailed,

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straightforward testimony by Mr. Stacy which was the subject of its extensive cross-examination. Mr. Redman, I would describe as a very vague witness and one who could not even say that Mr. Stacy had ever said he was quitting. He just, at most, tried to say that he assumed that Mr. Stacy was intending to quit. I suspect it took a lot of work to get him that far.

Now let's turn finally to Mr. Vickery. Vickery had no axe to grind. He was not a union advocate. He wasn't somebody they're claiming was involved in the grand conspiracy here. Mr. Morris, the operations manager, told you, under oath, that Vickery was a poor welder. But his two supervisors, Mr. Redman and Mr. Bettis, said Mr. Vickery was a good welder.

And there's—they said, Well, he mostly did fabrication. But Mr. Bettis said that the Sulphur Springs had a lot of fabrication, and it started one week after the layoff of Mr. Vickery. Then there's the, Well, he didn't do enough carpentry work or laborer work. But Mr. Bettis testified that, on the Sulphur Springs job, the welders just did welding.

And I think most significantly, as counsel has pointed out, Mr. Bettis acknowledges in the conversation with Mr. Vickery, saying, you know, I've learned that you were reconsidering your vote. What other purpose would there be for Mr. Bettis to make that comment, other than to make it very clear to the employee, You lost your job because you were thinking of voting for the union, where we thought you were one of our solid "no" votes?

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We have the meeting, of course, in Joshua, where Vickery clearly was engaged in protected concerted activity. He was speaking up on behalf of the contract welders about their problems; in particular, the issue of two men having to use the same motel room.

And, finally, we have the interesting return to work of Mr. Vickery, portrayed by the Company as, well, you know, this was a layoff and we just got around to calling him back. This is a company that had work continuously from the time they laid off Mr. Vickery. They were continuing to hire new employees. What happened on November 8?

Well, we know that the complaint issued in this case on October 29, and we know that normally the supervisors try to find people, call people to return to work, but in this case, Mr. Morris suggested Mr. Vickery to Bettis. I think the timing of that speaks to what happened. It wasn't a layoff at all.

Finally, you have saw the testimony of Mr. Vickery. Mr. Vickery gave extensive, detailed testimony, and again was subject to extensive cross-examination. I think he was a very credible witness.

Your Honor, these are hallmark violations of the Act and ones in which obviously employees could not exercise their rights to select their representative based on choice. So in addition to remedying the unfair labor practices, we believe that a rerun election should be ordered in this case.

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Thank you.

JUDGE GROSSMAN: Thank you.

Mr. Lonergan?

MR. LONERGAN: Yes, Your Honor.

CLOSING ARGUMENT ON BEHALF OF THE RESPONDENT

MR. LONERGAN: As I said in my opening, this was going to be a case of credibility issues, but I also said that it was more than a, he said, he said, incident. In this case, the context of the comments, what was going on at the workplace, support the validity of a company witness's testimony.

First, regarding the alleged discharge of Scott Stacy, Mr. Robbins made a remark that Redman put the wrong date on the form that he filled out. If that's an indication of anything improper, I guess the General Counsel suffers from the same problem, because at least

Redman was closer to the date than telephone conversation was in the complaint.

Stacy says he was discharged. Redman says he quit to avoid endangering a 35-year friendship. There's no question that they've had 35 years of close friendship. They've both testified

they were like brothers. they testified that Redman was in Stacy's first wedding, testified that Redman was a pallbearer at the funeral of Stacy's current wife's mother; testified they worked together on countless jobs; testified that they've hired each other at least five times.

Into this picture comes the events in June. It didn't

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matter to Redman that Stacy was union. He'd been union. He told Redman that he was union. Redman had hired Stacy back twice when he knew he was union. In May, Redman let Stacy go out to a union school. Stacy said it was a blueprint school; his wife said it was a steward school. It didn't matter to Redman. He let him to go off to go to it.

There was no problem until the time of the job disruptions, both at ANP and on Riesel. Now, counsel for General Counsel talks about the theory of divided loyalty as complex, and I submit that it's not, Your Honor. Mr. Loggins didn't testify, but we do have—nor did Mr. North, who was here for the first couple days of the hearing.

But we do have Mr. North's very clear statement in the Blue Light, which Mr. Stacy admits that he read, which said, "If you're not willing to help organize the salt or come off a non-union job when an agent asks you to, then charges must and will be filed. Your union is committed to organizing that work, but you must be committed to your union."

I would submit, coming off a job when the union asks you to, as opposed to when the employer asked you to can give you some divided loyalties between an employer and a union, and I don't think that's a very complex theory. I think it's putting—I think this direction puts an employee in an untenable situation.

Do they work until the union tells them to, or do they work

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until the employer tells them to? This employer runs a supplemental workforce. They don't have constant work for almost any of the employees. They work on jobs until the jobs are done. They don't have a lot of back-up, so if a person stops in the middle of a job, gets off in the middle of a job, disrupts the job by going with no notice somewhere else, that's a problem.

Who are they working for? The employer or the union? This direction says the union. Clearly, that's contrary to what Stacy knew was the duty that he would have owed Redman and to TEPSCO. It's uncontested that nine welders were fired off the ANP job just down the road for slowing down. After that, the Riesel job slowed down.

Kirk Carter, a foreman, supports Redman's testimony. No one supports Stacy's. Carter said that after the Loggins visit, he had to keep telling Stacy, an experienced welder, what to do. The dichotomy of that is obvious. Carter hadn't even worked as a welder. His testimony, when he gave his background, he's not a welder. Yet, after Loggins' visit to the job site, he testified he had to keep telling Stacy what to do.

Carter also said that Stacy would stop work, leave his job to talk to others, leave his job to talk to the union, that he disrupted his work. Now, General Counsel said there was only one other welder on the job. Well, Carter also very clearly testified to four or five other names that Stacy talked to, out

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on the job, disrupting his work and going to talk to them about the union.

Stacy made a big deal one night about a motel policy that was over two years old. There was clear job disruption. Your Honor, asked Robert Redman if the Riesel job finished on time. He turned to you and honestly answered, Yes, it did. And Your Honor asked him, Was there job disruption at Riesel, and he turned again to you and honestly answered, yes, there was. Brian Reese testified today on how those are not inconsistent. The job could have finished ahead of time.

Then there's the testimony of James Tilley, an independent representative of the client, not a TEPSCO employee. At the time that Tilley testified, Stacy, of course, had already testified that he and Tilley were talking. Carter came up to them; Carter interrupted them. There was no work to be done.

That's now how it happened at all. As Tilley's testimony, Stacy was down in the ditch. He was supposed to be working. Carter and Tilley were talking. Stacy got out of the ditch. He came, interrupted Carter and Tilley. They walked away. Stacy followed them. Finally, Carter just left the job site, told Stacy to get back to work.

That's clear evidence of a job disruption issue. Counsel for the General Counsel—and I don't think it's based on anything in the record—estimated it takes five to ten minutes, but on the other hand, it was a perfect example of

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where there was a third party to view what has been disputed testimony, and the third party totally and solidly supports what Carter said. So it becomes Carter and Redman and Tilley versus Stacy's story.

Then there's a conversation where either Stacy quit or was told he wasn't needed. If you're looking at what's been going on on the job, Loggins comes out to the job around the 8th. then there's the job disruptions, and that takes place only over a three- or four-day period.

On Saturday, the 12th, Stacy comes to Carter, with, as Stacy himself admitted, with relatively no notice, and says, I've got to go visit my mother-in-law. Carter lets him go. Comes back that Monday morning. Stacy says, My welding machine won't start. Carter's sure that he heard it start. Nevertheless, he leaves. More evidence of job disruption.

In the six days or seven days since Loggins had been out there, Stacy hadn't worked two-and-a-half of them. Redman's interpretation makes sense. He talked about the conversation he said Stacy brought up quitting. He said Stacy was concerned about their friendship. Redman said, It's only a matter of time until they ask you to do something.

Stacy says, They already have. Redman said, If that's the way it's going to be, then it probably is better that you not come back.

That ended the conversation. Redman filled out the termination form. He didn't think he was doing anything that

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Stacy didn't want him to do. When Stacy called him back a few days later, Stacy even himself admitted he didn't say, Take

me back to work. He never went to Morris, his supposed friend for 30-some years, and says, Hey, our mutual friend has wronged me; our mutual friend has said I quit, and I didn't. He never made a protest.

Matter of fact, Scott Stacy never said anything that he was treated unfairly or that he didn't resign. The first notice that the company had was in the objections to the election, which the union filed after the election. Certainly if Stacy had worked with these men 20 years, lived with them for 30, why didn't sometime he intervene; he come and say, You know what; you were wrong; I didn't quit. He didn't do that; by his own admission, he didn't do that.

And then that all fits in with the fact that they were worried, Ms. Stacy said, they were worried about this back in May, and she and her husband talked about, What if the union asked him to do something that would hurt the job. They talked about the quitting option back then.

And, moreover, Stacy has shown that he's often quit jobs. That's been—nothing wrong with it evidently. It happens evidently some in the business, but Stacy had a reputation for quitting. That was the way he solved some problems. If cattle prices went up; if, as his wife talked, they were having trouble with the well or whatever it is, then he'll quit the job. He

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quit the job here to avoid having his loyalties divided.

The final time that he was on the job also is fraught with inconsistencies in Stacy's testimony. He said that he couldn't get the welding machine started. Carter, of course, said he heard it start.

We asked for anything evidence of repairs, and we got a receipt that's in evidence as one of the Respondent's exhibits for a battery that he bought some eleven days later. That was supposed to be his receipt for the battery of the welding machine. Yet, according to his story, he called back two or three days later, and said he was ready to go back to work. So how he fixed it with the battery that he bought it eleven days later when he was ready to go back three days later is as inconsistent as the rest of his testimony.

And I object to the comments by Mr. Robbins about how much work it may have taken to have Mr. Redman testify to whatever. Redman sat there, obviously fraught with emotion, was candid, was honest, and gave solid testimony. And Stacy acted like he was reading from a script, and anytime either counsel for General Counsel or Union attorney would ask him a question, he stated the exact same thing. Even put the profanity in the same place of a sentence every time.

Respondent's position is that Stacy quit, and the facts indicate that that made logical sense.

As far as the 8(a)(1)s that Redman is accused of in the

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complaint, it says, "On or about June 20, he told an employee he and another employee were being laid off because of their union activities and their participation in NLRB hearing." Redman testified he doesn't—I don't know who that's supposed to be.

Stacy said he wasn't—didn't testify in an NLRB hearing. Redman said he didn't know if Stacy testified or not. The hearing—this is the 20th. As Mr. Robbins said, the hearing was the 16th.

Although counsel for the General Counsel said that the evidence shows that Loggins called up the motel, looking for Stacy to testify in a hearing, I think the evidence is actually what Mr. Robbins, that Carter said Stacy called—or Loggins called up, looking for Stacy. He didn't say why or anything like that, so I'm not sure what this refers to, but Redman, in specific request about whether he did that, denied that.

The next one on (b), "On June 25, Redman told the employee he was being laid off because of his union activities and membership." If that, again, is applying to Stacy, Redman, of course, spoke to that and denied that. If it's another employee, General Counsel didn't prove that. And Redman testified that he didn't say that Respondent would lose its contract and terminate its employees if the employees voted for the union.

The alleged discharge of Vickery, obviously, is—looking at the records this morning, as Your Honor pointed out, Vickery

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wasn't discharged. He's still an employee.

As I stated, it's a large, supplemental workforce, and they hire welders when they need them. Vickery this year didn't work between August 1 and November 8. That's not very unusual for Vickery.

Although there are credibility issues here, after hearing Mr. Vickery testify, maybe the determinative facts are actually agreed upon. He testified that he is not a union supporter, nor perceived as one. He testified at a big meeting, he asked if he could talk to Mr. Tellepsen, and Mr. Tellepsen said, Okay.

He testified that at the smaller meeting afterwards, that he about the hotel policy. He wasn't satisfied with Tellepsen's answer. He said that another employee asked the very same question, and he also said that employee is still working. He testified—and Morris agreed with that testimony—that Morris said something to him about the chain of command, which is not an illegal statement.

I don't think the General Counsel proved concerted activity on the part of Mr. Vickery, but even if they did, they didn't prove discrimination. Vickery testified for over the last six years, he has been the first welder laid off. His supervisor, Bill Bettis, Rick Morris and Robert Redman all agreed.

Vickery testified in 1998, he was off for ten weeks, so when you look at the exhibits in the record and show his time tickets, they'll actually show he's off for longer than that,

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but even in 1998, prior to any union activity, he called up the company and complained about favoritism. He should have been working; why was he the one laid off; why was Eddie Mac working instead of him.

There was no union activity to blame it on. the truth of the matter is the company likes Eddie Mac better than they like Jimmie Vickery. They always have. In 1998, the time tickets that were put into evidence will reflect, long before any union activity, that Eddie Hardwick, Eddie Mac Hardwick, worked

2,197 hours in 1998. Jimmie Vickery worked 1,560 hours in 1998.

What happened in 1999 was really on different, and Vickery admitted that under cross-examination. When I asked him, do you think you worked about the same number of days—actually, I think I said hours the first time—in ‘98 as in ‘99, he said, Well, we had some longer hours and this and this, and kind of said yes. But then I had to rephrase, and said, Did you work about the same number of days? He basically admitted he did.

‘99 was no different than what happened any other year. The evidence is clear that he’s always been the first one to go, and he’s the last one brought back. It was that way in ‘99, ‘98, and as Vickery himself testified, it was that way in ‘97 and ‘96 and ‘95 and ‘94 and ‘93. Ever since he was working for Bettis, that’s the way it’s been.

Vickery was not discriminated against. He’s back at work now. Undoubtedly he’ll be laid off again, because when the work

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goes down, he’ll be one of the ones to go. But nothing the company did was improper.

As far as the Tellepsen comments at the safety meeting, Mr. Tellepsen gave a candid and open account of what he said at that meeting. Everything he said was perfectly permissible. There was a contract. He said that that—how they earned that contract. Nothing that he said violated the law.

Vickery is the only witness the General Counsel brought in to support their allegations that Tellepsen said they would lose their jobs if the union won the certification election. 200 people, they brought in one witness, and I’m not even sure—and since we don’t have the record in front of us—I’d like to be able to cite to something, but I don’t even think that Vickery said that.

Vickery did say nothing that Tellepsen said threatened him; nothing that Tellepsen said coerced him, and I think that those are material comments, as to the reflection on what Mr. Tellepsen said.

Tellepsen testified that he talked about the company culture; he talked about the importance of being multi-skilled. And he did admit and say in response to a question, could he guarantee employment, the answer to that is no. If the answer would have been yes, that would have been a false answer. He could not guarantee employment, and he said he couldn’t guarantee it for

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employees, and he couldn’t guarantee it for management.

And he gave kind of a rah-rah talk that, you know, we’re only as good as how good we are, and that they had to work hard to keep their contracts. There’s nothing wrong with that. That doesn’t violate the law, and there’s nowhere that he said, employees would lose their jobs if the union won the certification election.

Morris testified that he heard the comments and testified to what Tellepsen said. He supported Tellepsen’s testimony. The General Counsel has not proved that Tellepsen said they would lose their jobs if the union won the certification election or any

reasonable facsimile of that comment. And I submit that if he would have said that, General Counsel could have found another witness out of 200 people to maybe back that up.

Finally, the allegations regarding Morehead, Kentucky: Tracy LaBuff testified he did not interrogate any employees. He didn’t say, contrary to Mr. Robbins’ statement, that he didn’t hear anything about the union. He did say he didn’t discuss it with the others. In reference to Mr. Robbins point, maybe he was on a different planet, I think it’s very clear that he was working at three different jobs, each of which was at least 70 miles from each other, two of which, of course, were 140 miles from each other. And his union witness, Jimmy Word, said he didn’t see much of him, once they got to Morehead.

The General Counsel put on Keve Blacksher, and Blacksher

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did testify that LaBuff interrogated him about his union activities. Clearly, Blacksher is a supervisor. In her closing, counsel for General Counsel said, Well, just because two supervisors are there, but on the other hand, when she put on all that evidence, she said she was putting it on, not for the truth of the matter with his testimony, but to prove anti-union animus.

If that’s the—and you admitted it, Your Honor, under those grounds, so it is not out there for the truth of the matter. I think that there’s no question that Blacksher is a supervisor. You know, he hired welders; he hired helpers; he transferred employees; he reprimanded; he directed the workforce; he assigned overtime; he was paid an extra hour; he got his fuel paid. There’s no question that he was a supervisor.

In fact, the Board knew that when they took his affidavit and even offered him company counsel at the time they took his affidavit, to be present for the interview. Blacksher refused. When I asked him why, he couldn’t explain that, or he wouldn’t, just like he couldn’t explain, or wouldn’t, why his \$2,000 fine from the union was waived at this point in time.

Two welders testified that are up from Kentucky, Freeman testified that, in fact, he didn’t ever hear LaBuff talk about the union. He said, There was union talk up and down the line, but he didn’t hear it from LaBuff, and LaBuff never interrogated

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him. Even the union witness testified that he was never threatened by LaBuff, and he said very clearly at the close of his testimony, he was always treated fairly by LaBuff. Again, counsel for General Counsel did not prove the allegations regarding the Morehead job site.

Concerning the objections to the election, the company ran a fair election. They researched what they could and could not do, and conducted an election according to the rules. No employee that they put on, no employee testified that they ever felt threatened; no employee testified that they felt coerced.

Word was the one employee that said he was interrogated by LaBuff, and he told LaBuff, It’s none of your business. And he testified, I wasn’t threatened, and I wasn’t coerced, and I was treated fairly. I’m not conceding Word’s testimony on whether he was asked that question or not, but I’m saying, he modified it in that regard.

In summary, it still comes down to a credibility issue. Your Honor mentioned that yesterday, mentioned to General Counsel that perhaps rebuttal might be appropriate. There wasn't any rebuttal. Vickery's testimony is totally unsupported. It's clear that he is—whether he's a good welder on fabrication or not, he's always the first out and he's the last back.

Stacy's testimony is unsupported, with the possible exception of his wife, whereas Redman's testimony is supported

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by Morris, Carter, Tilley.

In closing, Your Honor, Respondent asserts it clear that General Counsel did not meet their burden of proof in proving any of the allegations in the complaint.

JUDGE GROSSMAN: Ms. Kilpatrick, five minutes.

FURTHER CLOSING ARGUMENT ON BEHALF OF THE GENERAL COUNSEL

MS. KILPATRICK: Starting with—I hope to be fairly brief. Once again, Your Honor, with regard to Mr. Stacy, Respondent's argument is merely a reflection of their perception of Mr. Stacy, rather than reality.

Citing the Blue Light article where—in which the union was urging employees to leave nonunion companies, in this instance, surely the union would have wanted Mr. Stacy to stay on the job. They were trying to organize these employees. You don't want union hands to leave the job when you're trying to organize the job. That means fewer people voting for you. It just wouldn't make any sense at all.

Again, this is Respondent's perception of Stacy. They saw him suddenly as a potential problem. Mr. Carter says—testified he had to keep an eye on Stacy. I submit to you that that was probably because of the union organizational activity, the fact that Loggins had come out, and Mr. Carter wasn't too appreciative of having organized employees on his site.

Mr. Tilley's testimony, despite what counsel for Respondent said, was inconsistent with Mr. Carter's testimony. Mr. Carter said that he and Mr. Tilley were some distance off, and that Mr. Tilley said, No, he approached Mr. Carter, where Mr. Carter was working along with Mr. Stacy and Mr. Stutts and the other employees there.

If we're going to measure inconsistencies, Mr. Tilley didn't really agree with Mr. Carter

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about a lot of that. He considers the whole conversation rather jovial and all in fun, and didn't appear to be a work disruption, as characterized by Respondent.

Respondent's continued emphasis on the alleged disruptions of this job are puzzling, for want of a better word. It doesn't—it is not consistent that there would be several work disruptions in a matter of three or four days. If these disruptions were so serious, how could things not only have been on time, but both Redman and Carter were saying things were in good shape.

Now, with regard to Stacy's welding machine, to me this is a minor point, but Carter said he had no idea what was wrong with the machine. Carter also said he knew that Stacy had two machines. Everybody, including Stacy seemed to understand that he could probably go home and trade the machine out and

get his other machine. But he didn't, and the reason why he didn't is when he called Redman on Stacy's—on Carter's phone, Redman told Stacy to go home and call him in a couple days. And that's what he did.

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And why did he do that? Because Morris was mad about the union activity, told Redman to tell Stacy to stay home. And that's another reason that Mr. Stacy did not go to Mr. Morris, as counsel says he should have, and say, Hey, wait a second; you know, Redman says I quit, and I didn't quit. Redman told—Morris told Redman to fire Stacy, leave him at home. There's no reason that Stacy would have gone to Morris and said, Hey, I didn't quit. He knew that Morris had ordered him to be fired.

When talking about Mr. Vickery, counsel for Respondent alleged that 1999 was no different from 1998, 1997, or any of the prior years that Mr. Vickery had worked. That's just not true.

Whether it's measured in days or hours, Respondent did not produce a single instance in 1998 or '97 or any other time that Mr. Vickery worked for Mr. Bettis that he was furloughed—told he was furloughed from a job for a week, to set up another job, and then when there was another job waiting for him that was heavily involved in something Respondent acknowledges was his specialty—every other time, he was put on another job. If there was work available, he was there. The only time he was laid off and laid off for a long period of time was when there was no work available. And other employees had been laid off with Mr. Vickery.

Respondent never showed that new hires had been put in Mr. Vickery's place or that they had to place people from other

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supervisors' crews on a job, and while laying Mr. Vickery off. It's just not true. Clearly, the July and August 1999 furlough of Mr. Vickery was a termination. It was not a temporary layoff.

As counsel for the Union noted, Mr. Vickery was put back to work only after complaint issued in this case, and at Morris's urging to Mr. Bettis to give Mr. Vickery a call.

JUDGE GROSSMAN: Ready?

MR. ROBBINS: Yes, Your Honor.

JUDGE GROSSMAN: Go ahead.

FURTHER CLOSING ARGUMENT ON BEHALF OF THE CHARGING PARTY

MR. ROBBINS: One factual point: Counsel blurs the distinction between the Berea job and the Morehead job. On the Morehead job, Mr. Blacksher worked with two other fellows as a line welder. And that's not uncommon, what happens in the construction industry. He can be a foreman on a bigger job; then on a different job, they decide they don't need a foreman, and you go back to working with the tools. That's the most common thing in the construction industry.

In this case, I think that some of the critical words came from the mouths of the Employer's witnesses. Why would Mr. Redman say to Ms. Stacy, Well, the reason your husband isn't working is because of Leon Loggins from the union.

Why would Mr. Bettis say to Mr. Vickery, when he calls about why he isn't working, Bettis says—and Bettis admits,

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you know, Your foreman told me that you were thinking of changing your vote.

In *Town & Country versus NLRB*, the Supreme Court, in the context of professional organizers, rejected the divided-loyalty theory, and that's for a very simple reason. A worker has a right to openly support his union, to work to have a union in his workplace, and still have a job. That's the essence of what the Act is all about.

The divided-loyalty theory accounts—is simply a repeat of the National Labor Relations Act. Mr. Stacy had a right to openly not just be a member of 798, but say he wanted to have a union representative against TEPSCO without being fired. Mr. Vickery had a right to say, you know, I think I might like to vote for the union, without being fired. Mr. Blacksher and Mr. Word had a right to openly put stickers, saying that they wanted to have a union where they worked, without being threatened that the company would just shut the place down. The divided-loyalty theory is in contradiction with the National Labor Relations Act.

JUDGE GROSSMAN: Mr. Lonergan?

FURTHER CLOSING ARGUMENT ON BEHALF OF THE RESPONDENT

MR. LONERGAN: The divided-loyalty theory—and I agree, Your Honor, that they've got the right to organize employees. What they don't have the right to do—and where my divided-loyalty theory is—is disrupt the job or slow down the job

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or walk off the job with no notice. That's what the divided-loyalty theory that we're talking about is.

The company's position is: Loggins came out there; the job changed. There was job disruption. Everybody testified to it except Stacy. Now, counsel for General Counsel says, Surely the union would have wanted Stacy to stay. You know what? I've got an idea how they could have proved that. They could have called Loggins.

Or do you know what? Mr. North was sitting right there for two solid days. They could have had him testify to something like that. But they didn't do that. They didn't do that, and the facts are clear. Loggins came out there; the job was disrupted twice in a week. Stacy left in the middle of work. Divided loyalties or not, that's not permitted conduct. That's not protected activity.

The General Counsel's assertion that Tilley doesn't support Carter's version of the work disruption is ludicrous, and I submit that the record will show that.

The welding machine, she says, is a minor point. Well, if she's supervising a job and she's trying to get a job done, and the guy just doesn't come to work because supposedly his welding machine doesn't work, that's not really a minor point, and Redman didn't say, Call me later. He said, Get it fixed.

And Morris didn't say to fire Stacy. Morris said he didn't say that. Redman said he didn't say that. no one ever heard

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Morris say that. He didn't say that.

Regarding Vickery, It's uncontested that nobody at TEPSCO has ever hired Jimmie Vickery, other than Bill Bettis. Take that as a given. Everybody agrees to it. Okay? That's point number one.

General Counsel then took a list of every welder that was hired since Vickery had been laid off until the time that he was brought back. Bettis didn't hire any of those, uncontested. Uncontested that Bettis didn't hire any of them until Vickery.

Regarding the Morehead, job, i can agree with counsel for the Union that people go back to their tools. When they go back to the tools, however, and they're no longer foremen, normally their pay would change or their duties would change. Blacksher was still working as a foreman. LaBuff was superintendent on three different jobs a long way away. Additionally, once they got to Morehead, both Blacksher and Word agreed, even in their testimony, that there was little talk about who was going union and who wasn't going union, because the stickers were all put on in Berea. That was a moot issue by the time they got to Morehead.

The allegations in the complaint, Your Honor, are not supported by the testimony. The Company rests.

JUDGE GROSSMAN: I'm not going to go over all of the factual matters that have been discussed by various counsel. What I am going to do is simply point up what I consider to be

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determinative facts in making a resolution.

Did Scott Stacy quit, or was he fired? Scott Stacy denied that he quit. His testimony as to the final conversation that he had with Redman was that Redman said Morris had said to him, Leave him at home, and that he hated to do this. Stacy said, Am I laid off or fired. And Redman replied, according to Stacy, Any way you want it. In other words, whether he was laid off or fired was an issue that Stacy could decide.

I consider it unlikely that Stacy would have made the call to Redman, the last call to Redman, after Redman had failed to call him, if he did not want his job back. And I conclude that, in fact, he was let go. Whether it was a firing or a layoff is unimportant.

As counsel for the General Counsel and the Charging Party have pointed out, it came in the midst of Respondent's objections to the onset of the union campaign.

Were there disruptions to justify this action? Distribution of union stickers; speaking to Mr. Tilley, who acknowledged it was a jovial conversation; and in the midst of the admissions by Mr. Carter, Mr. Redman that the jobs finished on time, Respondent's counsel argues that the jobs might have finished ahead of schedule. I can't accept that as a persuasive argument. I don't think that there has been persuasive proof that there was disruptions that would have justified a termination or a layoff.

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With respect to Jimmie Vickery, he did testify that Howard Tellepsen said at the safety meeting, that he did say that the only reason we have the contract was because we were not union, and if we went union, we would not have it. I think there was some dispute as to whether or not he had said that. It seems to be clear that this is what Vickery testified to.

I credit his testimony that he told the company that he was considering—reconsidering his vote in favor of the company, i.e., that he might vote for the union, and that Bettis told him this was the reason he could not work there.

Respondent argues that Jimmie Vickery had been the first person in the past to be let off and the last to be rehired, or words to that effect, in years gone by. Well, if it is a fact that he was let off after saying he might vote for the union or might reconsider his position in favor of the company, which amounts to the same thing, then this is a factor to be considered, not whether or not in the past he had been let off. And as counsel for General Counsel has pointed out, the company was very busy.

I, therefore, conclude that Vickery was let go for this period of time, until he was reinstated after the complaint was filed, for discriminatory reasons.

Going back to Mr. Stacy, it seems to me that Mr. Redman's assertion to Ms. Stacy, whom I consider to be a very forthright and credible witness, establishes that it was the union

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affiliation that caused Respondent to terminate him.

Stacy quotes Redman as saying that when Stacy allegedly said that the union was trying to get him to stall or delay the work, and that Redman—and that this was disrupting—this is Redman testifying—disrupting his friendship with Redman that, according to Stacy, Redman then said, If that's the way you feel, don't come back.

Blacksher, with respect to the issue involving LaBuff, was not discharged, as far as the evidence indicates. Either he was still employed by the company or he was unemployable in an industry in which people are employed and then not employed and then re-employed again.

The Board has a standing rule that an employee's testimony is likely to be credible when he testifies against his employer's interest, on the grounds that, why would he jeopardize his own employment. I consider this rule to be applicable to the question of Blacksher, in addition to which we have the testimony of Jimmy Word, who says that LaBuff stated, If you become union, you won't work here.

And according to Jimmy Word, Tracy LaBuff said, Tellepsen will shut the job down; in addition to Jimmy Word testified that at the Morehead job, LaBuff asked employees how they were going to vote.

For these partial reasons, in addition to those advanced by General Counsel and Charging Party's counsel, I believe that the

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essential credibility issues must be determined in favor of the General Counsel.

Well, accordingly, I am going to issue decision. I will write this up when I get the transcript, which will require the company to cease and desist from engaging in the coercive acts which are set forth in the complaint. I'm going to recommend that they offer reinstatement to Scott Stacy and offer backpay to Vickery inasmuch as he again be re-employed.

And I also recommend that the election be set aside, because of the valid objections, to wit: and that a new election be held at such time as the Regional Director shall decide.

Do the parties have any comment before I close this hearing? General Counsel?

MS. KILPATRICK: No, Your Honor.

JUDGE GROSSMAN: Charging Party?

MR. ROBBINS: No, Your Honor.

JUDGE GROSSMAN: Respondent?

MR. LONERGAN: No, Your Honor.

JUDGE GROSSMAN: Well, thank you all for presenting your cases quite competently. And unfortunately in matters of this kind, we cannot all have winners, but I do thank you, and I declare the hearing now closed.

(Whereupon, at 2:25 p.m., the hearing was concluded.)

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CERTIFICATE

This is to certify that the attached proceedings before the NATIONAL LABOR RELATIONS BOARD, Region 16

IN THE MATTER OF:

TELLEPSSEN PIPELINE SERVICES COMPANY and
PIPELINERS LOCAL UNION NO. 798

CASE NUMBER: 16-RC-10120 and 16-CA-20035

PLACE: Fort Worth, Texas

DATE: December 10, 1999

were held according to the record, and that this is the original, complete, true and accurate transcript which has been compared to the reporting or recording accomplished at the hearing, that the exhibit files have been checked for completeness and no exhibits received in evidence or in the rejected exhibit files are missing.